Agriculture's Comments on Foster Work Discussion Points[1]

1. Impairment Standard.
    a. OCPI in General: OCPI was a tool available to Ecology under RCW 90.54.020(3)(a). It allowed Ecology to impair minimum instream flows set by rule when overriding considerations of public interest are established by the applicant for a change or transfer of a water right. We now know that between the time the statute was adopted and the time of the Foster decision Ecology relied on OCPI 42[2] times out of 4600 transfers processed. OCPI was relied on be Ecology to process less than .01 percent of the transfers during that time.
    b. The Impairment Standard and OCPI. In Foster the court disallowed the use of OCPI because under Washington law a change or transfer of a water right cannot impair (harm) other water rights. Agricultural water users have long lived with and relied on the existing rule of no impairment in a change and transfer.
        i. There is no reason to abandon or modify a basic tenant of water rights law in Washington to solve a problem that exists in less than a tenth of a percent of water right transfers
        ii. Agricultural water users rely on water rights which are settled. In other words, we know what we have, and we rely on those rights to produce food. A modification or elimination of the no impairment rule will create uncertainty among water users and disrupt agricultural water use.
        iii. It is also not appropriate to inject agency discretion into when and to what extend a water right can be impaired to accomplish a transfer as that will also create uncertainty among water right holders. The current rules provide appropriate and necessary sideboards to agency discretion.
    c. Impairment Conclusion. Water Users and Prospective Water users should rely on ways to accomplish a water right transfer without impairing other water users.
2. Mitigation.
    a. Each transfer, regardless of the purpose of the transfer, should have the ability to mitigate impairment which occurs because of the transfer. The mitigation of impairment can be accomplished though
        i. Water for water mitigation
        ii. Purchase of water from willing sellers
            1. Develop a market-based approach to water right sales
        iii. Enhanced reliance on the trust water rights program

[1] Comments follow and attempt to incorporate the General Outline prepared by task force staff in anticipation of the June 22, 2022 Task Force meeting

[2] The number appears to be somewhat uncertain. This writer's notes indicate 42 times but reference material in the Task force documents suggest it could be as low as 22. In addition, it is unclear where in the state Ecology relied on the OCPI.

Submitted by Jeff Slothower on July 11, 2022

1. Both conserved water and retired water can be protected from re-allocation to others and used for specific mitigation and other purposes

iv. Reliance on water created through conservation.

b. The committee has not had the opportunity to fully review mitigation that the legislature envisioned because the pilot projects were either abandoned by the applicant or not processed.

3. Conservation.
   a. Conservation in General. Conservation is a key element of any water use. Using less water to accomplish the same result is critical to making more water available for fish, people, and farms. However, under current standards conservation faces unnecessary limitations and unless our approach to conservation changes it will ultimately be ineffective and not implemented to its full extent.
   b. Water Uses and Conservation. Conservation should be approached with the following in mind.
      i. Types of water use subject to conservation
         1. Municipal Potable water:
            a. Conservation is accomplished through improvements or modifications of the potable water delivery system
            b. Conservation can also be accomplished by creating incentives for people to use less water in their homes and at their place of work.
         2. Municipal Non-Potable Water.
            a. Conservation can be accomplished through improvements or modifications of the non-potable water delivery system
            b. Conservation can be accomplished by minimizing and or eliminating these types of uses.
         3. The recapture and reuse of return flows and/or use of return flows or reclaimed water to recharge aquifers should be implemented whenever and wherever possible.
         4. Permit Exempt Use. While not an issue in incorporated cities and towns, people living in unincorporated areas of the state often rely on exemptions to the ground water permit requirement.
            a. The conservation measures applicable to Municipal potable water use can, with modification, be applied to domestic permit exempt uses to conserve water
            b. The non-domestic exempt water uses can have the same type of conservation measures, with modifications, applied to them as the municipal non potable water uses
         5. Agricultural Water conservation

a. The more efficient agricultural water users can be the more food agricultural users can raise with the same amount of water and in some cases with less water.
b. More efficient water delivery systems can also result in significant quantities of conserved water.
c. Continued reliance on existing and improving conservation incentives for both irrigation water delivery systems and on farm conservation coupled with the prospect of less water at the right time because of climate change will accelerate agricultural conservation.

ii. The Problem with Conservation. Conservation is often not a viable tool to rely on to mitigate for other water uses because of the inability to get the conserved water to the right place at the time it is needed to accomplish mitigation

1. Ground water sources and conservation. Ground water withdrawals using less water have an immediate effect because the conserved water stays in the aquifer.
    a. This occurs because the aquifer is in effect a reservoir which holds the conserved water so that it is available for other uses, including mitigation.
    b. The use of aquifer recharge using conserved water, where it will work, can increase the water in the aquifer and result in effective mitigation. Rules and regulations to simplify and expedite aquifer recharge should be encouraged.
    c. Moving surface water diversions to ground water diversions puts more water in the aquifer and enhances instream flow as less water is removed from the stream. This should be encouraged.
    d. Ground water diversions that can be moved to surface water diversions in areas where there is a declining aquifer should also be considered.
2. Surface Water sources and conservation. With surface water, conservation results in more water left in stream which may be good for instream flow uses but not for effective mitigation because the conserved water cannot be captured, stored and then retimed and repurposed for other uses including mitigation. This problem will be exacerbated if current climate change predictions are accurate.
    a. One obvious solution is to store the conserved water in reservoirs (large and small). With water held in a reservoir it is available to be used when it is needed for a specific purpose

i. Storage can result in effective mitigation because the water can be released when it is needed for mitigation.
ii. Storage can expand the season of use when seasonal water rights are converted to year-round uses.
iii. Storage helps instream flows as water can be held and released when there is a specific instream flow need

b. The use of reclaimed water also benefits from storage because the reclaimed water can be held until it is needed for mitigation.
c. Reservoirs can be sized to accomplish the desired mitigation in a variety of different situations.
d. Rules should be adopted, streamlined and implemented which accelerates the use of reservoirs as a mitigation tool
e. Replace ground water supplies with surface water supplies generated through irrigation conveyance conservation

4. Models. There seems to be too much emphasis on models. Models, if accurate and available, should just be one piece of evidence relied on to determine if the transfer meets the RCW 90.03.380 transfer criteria.
    a. The lack of a model should not serve as a basis to deny or delay the transfer
    b. Impairment should not be based on a model if the impairment measured is within the model's error range